

JONES DAY

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August 12, 2016

Lyle W. Cayce, Clerk  
United States Court of Appeals  
Fifth Circuit  
600 S. Maestri Place  
New Orleans, LA 70130

Re: *Macy's, Inc. v. NLRB*, No. 15-60022 (Petition for rehearing en banc filed July 18, 2016)

Dear Mr. Cayce:

The Third Circuit's decision in *NLRB v. FedEx Freight, Inc.*, No. 15-2585, 2016 WL 4191498 (3d Cir. Aug. 9, 2016) provides no basis for denying Macy's petition for rehearing en banc. As an initial matter, it does not address a principal basis for Macy's petition: namely, that the panel decision cannot be reconciled with *NLRB v. Purnell's Pride, Inc.*, 609 F.2d 1153 (5th Cir. 1980). *See* Macy's En Banc Pet. at 4-9. The Third Circuit's approval of the *Specialty Healthcare* framework says nothing about whether, as a matter of Fifth Circuit law, the Board may rely on *factual* distinctions without explaining their *legal* significance when making initial unit determinations.

Moreover, it is noteworthy that Judge Jordan concurred in the Third Circuit's judgment only because he believed FedEx had waived its challenge to the *Specialty Healthcare* framework. *See FedEx*, 2016 WL 4191498, at \*11-17 (Jordan, J., concurring). Were that challenge "properly before [the court, he] would [have] agree[d] with the Majority's understated observation 'that some statements in *Specialty Healthcare* might indicate significant changes in Board policy.'" *Id.* at \*16 n.12 (citation omitted). He also expressed his concern "that the changed standard seems to put a thumb on the scale in favor of the union's choice of unit, thus perhaps running afoul of . . . 29 U.S.C. § 159(c)(5), and encouraging the fragmentation of bargaining units." *Id.* For the reasons Macy's has articulated, the concerns highlighted by Judge Jordan independently warrant rehearing en banc. *See* Macy's En Banc Pet. at 9-15.

Word count: 250

Respectfully submitted,

/s/ Shay Dvoretzky

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**CERTIFICATE OF SERVICE**

I hereby certify that, on August 12, 2016, I filed the foregoing Rule 28(j) letter with the Clerk of this Court through the Court's electronic case filing system. The electronic case filing system will send a "Notice of Electronic Filing" to all counsel of record.

/s/ Shay Dvoretzky  
Shay Dvoretzky